

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
A.M. COMMUNICATIONS, INC.	:	DETERMINATION
F/K/A A.M. CABLE T.V. INDUSTRIES, INC.	:	
	:	
for Redetermination of a Deficiency or for	:	
Refund of Corporation Franchise Tax under	:	
Article 9-A of the Tax Law for the Fiscal Years	:	
Ended March 31, 1983 and March 31, 1985.	:	

Petitioner, A.M. Communications, Inc., f/k/a A.M. Cable T.V. Industries, Inc., One A.M. Drive, Quakertown, Pennsylvania 18951, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the fiscal years ended March 31, 1983 and March 31, 1985 (File No. 808314).

On January 10, 1991 and January 23, 1991, respectively, petitioner, by its representative, Robert A. Mann, C.P.A., and the Division of Taxation by William F. Collins, Esq. (Vera R. Johnson, Esq., of counsel) consented to have the controversy determined on submission of documents without hearing. After consideration of the entire record, Jean Corigliano, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Tax Appeals has subject matter jurisdiction to hear petitioner's challenge to two notices of deficiency, although petitioner did not request a conciliation conference or file a petition until approximately three years after the mailing of the notices of deficiency.

FINDINGS OF FACT

Petitioner, A.M. Communications, Inc., formerly known as A.M. Cable T.V. Industries, Inc., and the Division of Taxation entered into a stipulation of facts which has been substantially incorporated into the following findings of fact.

As a result of a corporation franchise tax field audit of petitioner's books and records, the Division issued to petitioner two notices of deficiency, each dated December 12, 1986. One notice, assessment number C861212100F, asserted a tax deficiency for the fiscal year ended March 31, 1983 in the amount of \$41,202.00 plus interest. The second notice, C861212101S, asserted a tax deficiency for the fiscal year ended March 31, 1983 of \$7,332.00 plus interest. The petition filed with the Division of Tax Appeals makes reference to a third notice of deficiency, but that notice was not placed in the record or referred to in the stipulation of the parties. The third notice may explain petitioner's reference in its petition to the period ended March 31, 1985, but it is not the subject of this determination.

The Division placed in the record the affidavit of Peter Pasternak, the Tax Audit Administrator of the District Office Audit Bureau, corporation tax section, who supervises the corporation tax section and is familiar with the mailing procedures of the Division's Processing Division. He described in detail the routine office procedure for preparing and mailing notices of deficiency emanating from the corporation tax section. Attached to Mr. Pasternak's affidavit were photocopies of the notices of deficiency in issue and a copy of the Certified Mailing Record (CMR), listing petitioner's name and address. Original copies of the notices of deficiency in issue bear certified mail control number 26584. The CMR shows the mailing of envelopes with control number 26584 to petitioner on December 12, 1986. The Division also offered the affidavit of Daniel D. LaFar, a principal clerk in charge of supervising the delivery of outgoing mail to branch offices of the United States Postal Service. The affidavit describes the specific procedures followed by that staff. The affidavit states that a clerk in the District Office Audit Bureau proofreads each notice of deficiency, assigns and affixes a certified mail control number to the envelope containing the notice, records the control number on a CMR,

and places the envelope and CMR in an outgoing mail basket where it is collected by the staff of the Processing Division. A mail room clerk personally delivers the envelopes and the CMR to a branch of the Postal Service with the proper postage affixed. Upon receipt, a post office employee inspects the envelopes and CMR and affixes a post office date stamp to the CMR. The CMR listing petitioner's name and address is initialed by the postmaster and bears a Postal Service date stamp of December 12, 1986. Petitioner's name and address as it appears on the notices of deficiency and the CMR is A.M. Cable TV Industries, Inc., Attn. John Strzelecki, 1 AM Drive, Quakertown, PA 18951. Petitioner and the Division stipulated to the following fact: "That petitioner during all times mentioned herein conducted business at One AM Drive, Quakertown, Pennsylvania".

On or about September 22, 1987, the Division mailed a letter to petitioner, requesting payment of unpaid taxes. The letter references assessment numbers C861212100F and C861212101S (those in issue here), and it states, in pertinent part: "The balance of your account, with accrued statutory charges, is shown above. Unless this balance is paid within 10 days from receipt of this notice, a tax warrant may be filed against you." A copy of that letter was placed in the record. A handwritten note was placed on the bottom of the letter indicating that on September 28, 1987, one of petitioner's employees contacted the Division and discussed the arrearages. He apparently spoke to a tax compliance agent identified as A. Mohammed. The note states, in part: "Called 9/28/87--Explained situation and will provide info necessary to clear up situation. Will make payment on small assessments and try to elim. The total of the large ones (approx. \$88K). Will await... " (The remainder is illegible).

By letter dated October 1, 1987, Mr. Strzelecki, responded to Mr. Mohammed on petitioner's behalf. Essentially, this letter states that petitioner had no New York State tax liability for the period assessed and intended to submit information proving that contention.

On December 16, 1989, petitioner filed a request for a conciliation conference, consisting of a letter dated December 11, 1989. According to the letter, petitioner first became aware of the outstanding assessments at issue here when it received the Division's letter of

September 22, 1987. Petitioner's letter goes on to state:

Mr. John Strzelecki, the former controller of A.M. Communications, Inc., immediately responded to the notice on October 1, 1987, indicating that they were in disagreement with the notice. This constitutes a request to petition the New York State Department of Taxation and Finance for review of the assessment. The taxpayer feels this response is within the 90 day period and constitutes a timely response to the notice. The taxpayer responded immediately to the notice once they were aware of it.

There were no notices or letters at the taxpayers [sic] place of business which should indicate that the taxpayer was notified previous to September 22, 1987 by the New York State Department.

The Division issued a Conciliation Order, dated March 2, 1990, dismissing petitioner's request for a conference on the ground that the notices of deficiency contested were mailed on December 12, 1986, but the request for a conference was not mailed until December 16, 1989.

CONCLUSIONS OF LAW

A. Tax Law § 1081(a) requires that the Division mail a notice of deficiency by certified or registered mail to a taxpayer's last known address. To prove that it complied with this provision, the Division offered the affidavits of two employees familiar with the preparation and mailing of notices of deficiency, a Certified Mailing Record, and copies of the notices of deficiency. The affidavits describe the procedures generally followed by the Division and provide an explanation of the pertinent records of mailing. This evidence was sufficient to establish that the Division mailed the notices of deficiency to petitioner at its last known address on December 12, 1986. (see, MacLean v. Procaccino, 53 AD2d 965, 386 NYS2d 111, 112; Matter of Lawrence and Dory Rosen, Tax Appeals Tribunal, July 19, 1990).

Petitioner does not assert that the notices were not mailed to its last known address, but it does allege that the notices were not received. The language of section 1081(a) is identical to that of section 681(a) of the Tax Law. In construing the latter provision, New York's courts have held that in determining whether there has been compliance with the statute, it is immaterial whether the taxpayer did or did not actually receive the notice (see, Matter of Agosto v. Tax Commn., 118 AD2d 894, 499 NYS2d 457, 459 [and cases cited therein], revd on other grounds 68 NY2d 891, 508 NYS2d 934). In view of the similarity between section 681(a) and

section 1081(a), the same rule must govern here.

At the time the notices of deficiency in question were issued section 1081(b) of the Tax Law provided that a notice of deficiency mailed in accordance with section 1081(a) "shall be an assessment of the amount of tax specified in such notice", unless the taxpayer filed a petition with the former State Tax Commission within 90 days of the mailing of that notice. Section 1089(b), in effect at the time of the issuance of the notices of deficiency to petitioner, states that a taxpayer "may file a petition with the tax commission for a redetermination of [a] deficiency", within 90 days of the mailing of a notice of deficiency to the taxpayer's last known address. Since the Division established that it mailed the notices of deficiency in question to petitioner's last known address on December 12, 1986, those notices became assessments of tax on March 12, 1987, or 90 days later, and petitioner no longer had a statutory right to seek review of the notices by the former State Tax Commission.

B. Effective September 1, 1987, the adjudicatory functions of the former State Tax Commission were assumed by the Division of Tax Appeals. The enabling legislation of the Division of Tax Appeals states:

"[a]ll proceedings in the division of tax appeals shall be commenced by the filing of a petition with the division of tax appeals protesting any written notice of the division of taxation which has advised the petitioner of a tax deficiency..." (Tax Law § 2008).

Tax Law § 2006(4) provides that:

"[T]he liability of such person [who seeks review of taxes claimed to be due] shall become finally and irrevocably fixed, unless such person, within ninety days from the time such liability is assessed, shall petition the division of tax appeals for a hearing...."

As an alternative to petitioning for a hearing in the Division of Tax Appeals, a taxpayer "may request a conciliation conference by filing a written request...with the Bureau of Conciliation and Mediation Services" ("BCMS") (see 20 NYCRR 4000.3[a]). BCMS is responsible for providing a conference at the option of any taxpayer who has received a written notice of deficiency, "if the time to petition for such a hearing has not elapsed" (Tax Law § 170.3-a). Inasmuch as petitioner failed to file a petition with the former State Tax

Commission within 90 days of the mailing of the notices of deficiency in question, neither BCMS nor the Division of Tax Appeals has the authority to examine petitioner's current challenge to those notices.

C. There is no merit in petitioner's contention that the Division's letter of September 22, 1987 acted as a notice of deficiency. It was a request for payment of the taxes asserted by the notices of deficiency issued on December 12, 1986. By the time the letter was sent, the tax deficiencies asserted had become fixed and final assessments of tax.

D. The petition of A.M. Communications, Inc., formerly known as A.M. Cable T.V. Industries, Inc., is dismissed.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE